SUPREME COURT, U. S.
(38942)

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IN THE

Supreme Court of the United States

October Term, 1967

No. 635

ROBERT VINCENT GARDNER,
Appellant,

v.

VINCENT L. BRODERICK, as Police Commissioner of the City of New York and THE CITY OF NEW YORK,
Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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INDEX

	PAGE
QUESTION PRESENTED	2
FACTS	2
A. Charge Against Appellant	2
B. Departmental Hearing	3
Assistant District Attorney Andreoli's Testimony	3
Appellant's Grand Jury Testimony	5
Motion to Dismiss	6
Appellant's Case	6
C. Commissioner's Determination	6
ARGUMENT	
The dismissal of a policeman does not violate his rights under the United States Constitution when the dismissal is pursuant to Article I, Section 6, of the New York Constitution and Section 1123 of the New York City Charter, which require a public employee to be discharged if he refuses to sign a waiver of immunity and to answer relevant questions before a grand jury concerning his conduct and performance of official duties and which have been interpreted to require a hearing before such discharge at which the public employee is afforded an opportunity to explain his refusal to waive immunity or to answer such questions	7
CONCLUSION	13

CASES CITED

	PAGE
Beilan v. Board of Education, 357 U. S. 399 (1958)	8
Conlon v. Murphy, Matter of, 24 A D 2d 737, 263 N.Y.S. 2d 360 (1965)	9
Gardner v. Murphy, Matter of, 46 Misc. 2d 728, 260 N.Y.S. 2d 739 (1965)	9
Garrity v. New Jersey, 385 U. S. 493 (1967)	7, 9, 10
Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U. S. 341 (1920)	12
Kansas Endowment Asso. v. Kansas, 120 U. S. 103 (1887)	12
Koutnik v. Murphy, Matter of, 25 A D 2d 197, 268 N.Y.S. 2d 265 (1966)	9
Lerner v. Casey, 357 U. S. 468 (1958)	8
McGoldrick v. Compagnie Generale, 309 U. S. 430 (1940)	12
Nelson v. County of Los Angeles, 362 U. S. 1 (1960)	8
Scholl v. Bell, 125 Ky. 750, 102 S.W. 248 (1907)	11
Slochower v. Board of Education, 350 U. S. 551 (1956)	7, 9, 11
Spevack v. Klein, 385 U. S. 511 (1967)	10
Steinberg v. United States, 141 Ct. Cl. 1, 163 F.Supp. 590 (1958)	11
Wilson v. Cook, 327 U. S. 474 (1946)	12

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MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case, pursuant to a request of this Court transmitted by its Clerk, moves to dismiss or affirm the appeal on the ground that the questions presented are so insubstantial as not to need further argument.

Question Presented

Where a police officer, after being called before a grand jury and refusing to sign a waiver of immunity with respect to testimony concerning the conduct of his office and the performance of his official duties, is granted a hearing at which he fails to offer any explanation of such refusal and is thereafter dismissed from his position pursuant to Article I, Section 6, of the New York Constitution and Section 1123 of the New York City Charter, does such dismissal violate his rights under the United States Constitution?

Facts

A. Charge Against Appellant

The charge against the appellant was, as follows (RA 1):*

> "The District Attorney of New York County has advised the Police Commissioner that you were called and appeared before the Grand Jury of New York County on the 6th day of August, 1965, and that you refused to waive immunity from prosecution as provided in Section 1123 of the New York City Charter and Article I, Section 6 of the Constitution of the State of New York.
>
> "You are, therefore, directed to appear before a Trial Commissioner in the Board Room on the second floor of Police Headquarters, 240 Centre Street, New York, New York, on the 10th day of August, 1965, at 2:30 P.M., to show cause why your employment as a

* All references are to pages of the Respondents' Appendix in the New York Court of Appeals unless otherwise indicated.

member of the Police Department should not be terminated and your office vacated as prescribed by the aforesaid provisions of law."

B. Departmental Hearing

The charges against the appellant were tried before Leonard E. Reisman, Hearing Officer, on August 10, 1965. The appellant was present and was represented by counsel (RA 2).

At the hearing, the Police Department introduced in evidence a letter from Mr. Andreoli, Assistant District Attorney, New York County, advising the Police Commissioner that appellant had refused to sign a limited waiver of immunity (RA 3, 5). A copy of the notice of the charge was offered in evidence and was objected to by the appellant, who also moved to have two other charges then pending against him included in this limited hearing. The Hearing Officer overruled the objection, denied the motion and admitted the letter from the District Attorney's Office and the notice of the charge in evidence (RA 3-5).

Assistant District Attorney Andreoli's Testimony

Mr. Peter D. Andreoli testified that the appellant was called before the Second August 1965 Grand Jury in New York County on August 5, 1965, and was tendered a limited waiver of immunity but was not placed under oath (RA 6). He further testified that the appellant was advised that the Grand Jury "wished to question him concerning the conduct of his office in the performance of his duties" and, at appellant's request, there was an adjournment to enable him to discuss the limited waiver with his attorney (RA 7).

On August 6, 1965, appellant reappeared and was advised of his rights and the nature of the investigation, which was to determine whether the crimes of conspiracy to bribe public officers had been committed, specifically concerning bribes by gamblers to police officers to aid in the continuance of unlawful gambling (RA 7-8).

The appellant then refused to sign a waiver of immunity because "his attorney told him he was a target of an investigation" (RA 7, 8, 20).

The Department next offered the unsworn statements of appellant before the Second August 1965 Grand Jury and a copy of the limited waiver of immunity, which were admitted in evidence over objection (RA 7, 8, 12-23).

On cross-examination, Mr. Andreoli testified that appellant appeared before the Grand Jury pursuant to a subpoena and that he was a potential defendant of the investigation (RA 9). He further testified that, had the appellant signed the limited waiver of immunity, he would have been questioned at that time.

The Court order releasing the Grand Jury minutes was then admitted in evidence (RA 10).

Appellant's Grand Jury Testimony

The grand jury minutes before the Second August 1965 Grand Jury, which were admitted in evidence (RA 7-8), disclosed that appellant appeared as a witness and was not sworn. He was advised of the nature of the Grand Jury investigation, which he stated he understood and had been aware of since June of 1964 (RA 13). After his constitu-

tional rights and his duty to testify under the Constitution of the State of New York and the New York City Charter if he wished to retain his public office had been explained, appellant stated that he was represented by counsel who was not present at the time and that he, therefore, requested an adjournment to show the limited waiver of immunity to his attorney. This request was granted (RA 14-16).

On August 6, 1965, appellant was recalled as a witness, but was not sworn. He was again informed of the nature of the Grand Jury investigation (RA 19). He stated that he had discussed his constitutional rights and his duty to testify with his attorney and stated, "On the advise of my attorney I have been regarded as a target of this investigation, and you have no authority to question me.". He was then advised that he had been called before the Grand Jury as a public officer to testify concerning the performance of his duties as a police officer (RA 20). Appellant then refused to sign the waiver of immunity (RA 21).

Motion to Dismiss

Decision on the motion to dismiss the charge because the appellant had been subpoenaed and was a target of the investigation was reserved (RA 11).

Appellant's Case

Appellant did not offer any evidence on his behalf or offer any explanation of his refusal to sign a waiver of immunity (RA 11).

C. Commissioner's Determination

In the report of Hearing Officer Reisman, dated August 11, 1965, he found that appellant had been called before the Grand Jury and had refused to sign a waiver of immunity as required by Section 1123 of the New York City Charter. He recommended that appellant's employment be terminated and his office vacated (RA 24).

Based on these findings and recommendations, Police Commissioner Broderick ordered appellant's office vacated (RA 25).

ARGUMENT

The dismissal of a policeman does not violate his rights under the United States Constitution when the dismissal is pursuant to Article I, Section 6, of the New York Constitution and Section 1123 of the New York City Charter, which require a public employee to be discharged if he refuses to sign a waiver of immunity and to answer relevant questions before a grand jury concerning his conduct and performance of official duties and which have been interpreted to require a hearing before such discharge at which the public employee is afforded an opportunity to explain his refusal to waive immunity or to answer such questions.

(1)

The appellant argues that to dismiss him for refusing to waive immunity and testify before a grand jury constitutes a violation of his rights under the Fifth Amendment. He relies primarily on the cases of *Slochower* v. *Board of Education,* 350 U. S. 551 (1956) and *Garrity* v. *New Jersey,* 385 U. S. 493 (1967).

Slochower involved the dismissal of a teacher at a public college pursuant to Section 903 of the New York City Charter because he had refused, before a Congressional committee, to answer questions concerning membership in the Communist Party. The opinions of this Court first made it clear that a sinister meaning could not be imputed merely because a person exercised his right under the Fifth Amendment to refuse to testify. The opinion then said that Section 903, as interpreted and applied, operated to discharge every employee who invoked the Fifth Amend-

ment (p. 558). It went on to say that the questions asked were being taken as confessed and that no consideration was being given to such factors as the subject matter of the questions or justification for the exercise of the privilege.

It then said (p. 558):

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or * * * official conduct of city employees.'"

The case, therefore, appears to have been decided on two grounds. One related to the nature of the inquiry at which the refusal to testify occurred. The other emphasized the automatic discharge for exercising the Fifth Amendment right before an agency other than the employer—the absence of an opportunity for the employee to explain his exercise of the privilege or for the employer to consider the circumstances of the refusal to answer.

Other decisions of this Court hold that a public employee who fails to answer questions relating to his employment may be dismissed pursuant to a relevant statute if he has had an opportunity to explain his refusal at a hearing before an appropriate body. *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960).

New York City Charter, Section 903, involved in the *Slochower* case, and its successor section, Section 1123 of the City's new charter, are identical. Both, if read literally, require an automatic dismissal of an employee for refusal to testify at specified hearings or inquiries. Nevertheless, after the *Slochower* decision, the New York courts treated the section and Article I, §6, of the New York Constitution as requiring a hearing before dismissal. *Matter of Conlon* v. *Murphy*, 24 A D 2d 737, 263 N.Y.S. 2d 360 (1965). The same rule was applied in the two cases decided under the title of *Matter of Gardner* v. *Murphy*, 46 Misc 2d 728, 260 N.Y.S. 2d 739 (1965). As a result the appellant herein was given a hearing and, thereafter, dismissed. The companion case was reversed because of its peculiar circumstances. *Matter of Koutnik* v. *Murphy*, 25 A D 2d 197, 268 N.Y.S. 2d 265 (1966), app. to New York Court of Appeals pending.

In *Garrity* it was held that answers given by police officers to questions asked them in the course of an Attorney General's investigation could not be used against them in a criminal prosecution. The answers were excluded on the ground that they were coerced confessions because the police officers were faced by a choice of either answering the questions or forfeiting their jobs by reason of a New Jersey forfeiture of office statute similar to the New York Constitution and City Charter provisions here involved. This Court did not pass on the validity of the forfeiture of office statute. It confined itself to holding that answers given under threat of its application are coerced and, therefore, cannot be used in a criminal prosecution of the police officers.

In the companion case of *Spevack* v. *Klein*, 385 U. S. 511 (1967), this Court held that a lawyer cannot be disbarred because he invoked the Fifth Amendment as the ground for refusing to honor a subpoena to produce financial records and for refusing to answer questions relevant to charges of misconduct in carrying on his law practice. It said that the threat of disbarment was a powerful form of compulsion to make a lawyer relinquish the Fifth Amendment privilege.

Mr. Justice DOUGLAS, who spoke for the majority in both the *Garrity* and *Spevack* cases, wrote the following footnote in the *Spevack* opinion (385 U. S. at p. 516):

> "3. Whether a policeman, who invoked the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach."

Mr. Justice FORTAS, in his concurring opinion in that case, said (385 U. S. at p. 519):

> "But I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."

The quoted reservations apparently apply to an automatic discharge of a police officer for refusing to testify.

Here the dismissal was not automatic. At the hearing granted appellant subsequent to his refusal to waive immunity, he failed to offer any explanation for such refusal.

Steinberg v. *United States*, 141 Ct. Cl. 1, 163 F. Supp. 590 (1958), relied on by appellant, held that a statute which *automatically* revoked a federal pension as of the date that the pensioner refused to testify before a grand jury, federal court or congressional committee was invalid. The Court relied on the *Slochower* case.

It should be recalled that the Grand Jury investigation was concerned with a conspiracy to bribe police officers to permit illegal gambling operations, that the appellant was advised of the nature of the investigation and that he was requested to sign a limited waiver of immunity (RA 12, RA 19). The waiver was limited to matters "concerning the conduct of my office on the performance of my official duties" (RA 22).

Appellant, as a police officer, had a duty to furnish the appropriate authorities with information pertinent to his employment. This is especially significant where the conduct in question relates to the administration of justice and the integrity of the Police Department. His refusal to sign a limited waiver of immunity in this investigation concerning the bribery of police officers and his failure, at his hearing, to give reasons for his refusal are inconsistent with his duty as a police officer. Having breached his duty, appellant was properly dismissed.

Particularly apt is the following statement in *Scholl* v. *Bell*, 125 Ky. 750, 102 S.W. 248, 261-262 (1907):

"Here were police officers being interrogated as to existence of crimes they were paid to prevent, if possible; if not, to expose and punish afterwards; and yet they one and all refused to answer 'under advice of counsel.' Suppose a secret murder had been committed, and the police officer on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him?"

(2)

The appellant also argues that he has been denied equal protection of the laws (Juris. Statement, pp. 6-7). The petition in the New York Supreme Court instituting this proceeding alleges in general terms that there has been a denial of equal protection of the laws (Par. "Sixth"). The issue, however, was not presented to the New York Appellate Division or to the Court of Appeals. And there is not the slightest indication that the New York courts ever considered the issue. It would appear, therefore, that it cannot be raised on this appeal. *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. 341, 343-344 (1920); *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 433-434 (1940); *Wilson* v. *Cook*, 327 U. S. 474, 483-484 (1946). Moreover, the reference in the petition to equal protection of the laws does not specifically refer to the United States Constitution despite the fact that there also is an equal protection clause in Article I, §11, of the New York Constitution. *Kansas Endowment Asso.* v. *Kansas*, 120 U. S. 103, 104 (1887).

In any event, the appellant's equal protection argument lacks merit. It appears to assume that we are dealing with

a case where the police officer has testified before a grand jury and that such testimony is being used as the basis for a dismissal, which is not what occurred in the present case. At the least, it assumes that the New York Court of Appeals has held that the burden of proof of misconduct, which ordinarily is on the party seeking to have a police officer dismissed, is on the appellant in the present case.

All that has been held, however, is that a police officer who has refused to furnish information to a grand jury regarding the conduct of his office and the performance of his official duties may be discharged unless he offers an appropriate explanation for such refusal. This applies to all police officers. Even if it varies from the rule applicable under other circumstances, it is reasonable; and it is not discriminatory because of its uniform application to all police officers pursuant to the New York Constitution and the New York City Charter, as interpreted since the *Slochower* decision.

CONCLUSION

The appeal to this Court from the judgment of the New York Court of Appeals should be dismissed, or the judgment affirmed.

January 8, 1968.

Respectfully submitted,

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